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No. 88-241

In the Supreme Court of the United States

OCTOBER TERM, 1988

NATIONAL GYPSUM COMPANY, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in concluding that the United States Environmental Protection Agency's school-asbestos rules were lawful under the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. (Supp. IV) 2641-2654.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is reported at 846 F.2d 79.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1988. The petition for a writ of certiorari was filed on August 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On October 17, 1987, the United States Environmental Protection Agency (EPA) issued rules pursuant to the Asbestos Hazard Emergency Response Act of 1986

(AHERA)[1] requiring schools—described as local education agencies (LEAs) under AHERA—to establish and to execute plans to manage asbestos-containing materials found in school buildings. 52 Fed. Reg. 41826 (1987) (AHERA rules).[2] Several former manufacturers of asbestos-containing products, including petitioner, challenged the rules as failing to fulfill AHERA's mandate. The court of appeals upheld the AHERA rules (Pet. App. A1-A13).

1. Since 1979, the EPA has operated a technical assistance program to assist LEAs and other building owners to identify and to control asbestos in their buildings. In connection with that program, the EPA issued several documents designed to provide guidance for managing asbestos in buildings. The last of such guides, issued in 1985, was entitled "Guidance for Controlling Asbestos-Containing Materials in Buildings" and is known as the "Purple Book." The book provides a brief intro-

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[1] Pub. L. No. 99-519, 100 Stat. 2970. Section 2 of AHERA, 100 Stat. 2970-2988, added Title II to the Toxic Substances Control Act (TSCA), 15 U.S.C. (Supp. IV) 2641-2654, which is reproduced in the appendix to the petition for a writ of certiorari (at A14-A51). Hereafter, we cite AHERA to the United States Code section but omit express reference to "Supp. IV."

[2] Exposure to asbestos presents well-documented and potentially serious risks to public health, including asbestosis, pleural and peritoneal mesothelioma, and cancers of the lung and other organs. The asbestos in place in school buildings could release dangerous fibers if not dealt with properly, and even ordinary maintenance and cleaning can cause dangerous concentrations of fiber. See 47 Fed. Reg. 23363 (1982); see also 45 Fed. Reg. 61969 (1980). Although the EPA banned use of asbestos in 1973 (40 C.F.R. 61.148; 38 Fed. Reg. 8826 (1973)), a large amount of asbestos used before 1973 remains in buildings, including schools, throughout the country.

Citations to the AHERA rules are hereafter to the provisions of 40 C.F.R. at which they are to be codified. See Pet. App. A53-A103.

duction to the problem of asbestos but is merely advisory and contains only general guidance.

In response to a number of concerns about the EPA's asbestos program, Congress enacted AHERA in 1986. It expressly found that the EPA's then-current rules for dealing with asbestos in schools did not contain "standards for * * * appropriate response actions" or a "requirement that response actions * * * be carried out in a safe and complete manner." 15 U.S.C. 2641(a)(1). Congress also found that there was neither a uniform program for accrediting persons who identify or remove asbestos nor a regulatory requirement that only accredited persons perform those tasks. 15 U.S.C. 2641(a)(2). In addition, Congress determined that the EPA's Purple Book was insufficient to ensure adequate responses. 15 U.S.C. 2641(a)(3).

Accordingly, Congress in AHERA directed the EPA to promulgate comprehensive rules within 360 days of the statute's enactment. 15 U.S.C. 2643(a). The rules must (1) require schools to inspect for asbestos; (2) describe response actions for at least four circumstances—when there is actual or reasonably likely damage or significant damage to friable asbestos[3]; (3) require schools to implement those response actions; and (4) require schools to develop management plans detailing the inspection of, and actions to be taken with respect to, asbestos. 15 U.S.C. 2643(b)-(e) and (i). The EPA's regulations "must protect human health and the environment" (15 U.S.C. 2643(a)),

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[3] The statute requires the EPA to define the appropriate response action in at least four circumstances—when there is either (a) damage or (b) significant damage to friable asbestos-containing material, and when such asbestos is in areas regularly and normally used by building occupants and either (c) damage or (d) significant damage is reasonably likely. 15 U.S.C. 2643(c). Asbestos-containing material is "friable" if, when dry, it may be "crumbled, pulverized, or reduced to powder by hand pressure" (15 U.S.C. 2642(6)).

and they must offer such protection against both "*actual* [and] *potential* exposures to releases of asbestos that may cause adverse effects on human health or the environment" (132 Cong. Rec. H8823 (daily ed. Oct. 1, 1986) (remarks of Rep. Florio) (emphasis added); 132 Cong. Rec. S15065 (daily ed. Oct. 3, 1986) (emphasis added) (joint explanatory statement)).

More specifically, AHERA requires that the EPA, in describing appropriate response actions, identify the least burdensome methods that protect human health and the environment, taking into account local circumstances, including occupancy, building use, and costs. 15 U.S.C. 2643(d)(1)-(5). The statute also directs the EPA to consider and assess various technologies in order to improve LEAs' response-action decisionmaking processes. 15 U.S.C. 2643(c)(2). And, to ensure that there is oversight and participation by parents, teachers, and school employees, the EPA's regulations must require each LEA to develop an asbestos management plan (15 U.S.C. 2643(i)) that includes, among other things, the results of the inspection of the school buildings and a detailed description of the measures to be taken in response. 15 U.S.C. 2643(i)(1)(A)-(I). That plan must be made available for inspection by the public (15 U.S.C. 2643(i)(5)) and must be submitted to the Governor (15 U.S.C. 2643(i)(6)), who is empowered to disapprove it if, among other things, it does not conform to the EPA's AHERA rules (15 U.S.C. 2645(a) and (c)).

2. The AHERA rules promulgated by the EPA prescribe detailed procedures for the inspection of schools. They require that inspectors be accredited (40 C.F.R. 763.85)[4] and that each inspector classify any

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[4] AHERA provides that no one may inspect a school, develop a management plan, or design or conduct response actions without

damaged or potentially damaged asbestos according to prescribed categories (40 C.F.R. 763.88(a)(1)) and provide the LEA with a written assessment (40 C.F.R.763.88(b)). Under the rules, an accredited management plan developer must then recommend in writing appropriate response actions in accordance with the AHERA rules. That recommendation must be placed in the LEA's mandatory management plan (40 C.F.R. 763.93) and submitted to the Governor and made available to the public—in particular, to parents, teachers, and other school employees (40 C.F.R. 763.93(a) and (g)(1)(4)).

In accord with prevailing scientific opinion, the EPA decided not to prescribe air monitoring as the primary tool for determining the appropriate response action for asbestos. The agency explained that numerical values in air tests would "provide a false sense of precision regarding the presence and severity of asbestos hazards"—specifically, the threat posed by episodic releases of asbestos fiber. 52 Fed. Reg. 41838 (1987). It concluded, instead, that visual inspection of the condition of asbestos-containing materials in particular locations, when conducted by a trained expert, would be a better method for evaluating potential as well as actual fiber releases. *Id.* at 15831, 41838.

In addition to rejecting air monitoring as the primary assessment tool, the EPA refined the definitions of the categories of asbestos problems identified by Congress (actual or potential damage or significant damage). 40 C.F.R. 763.83; see 52 Fed. Reg. 15823 (1987). For example,

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being properly accredited. 15 U.S.C. 2646(a)(1)-(3). Accreditation must be accomplished either by the EPA or by a state that has a plan at least as stringent as the EPA Model Accreditation Plan (15 U.S.C. 2646(a)), which requires initial accreditation and annual refresher courses. The Model Plan is codified at Appendix C to Subpart E of 40 C.F.R. Pt. 763.

the agency's definitions for damaged asbestos focus on physical characteristics such as loss of structural integrity, sagging, water damage, gouges, and the like. The EPA also defined the various response actions identified by Congress in AHERA. The definitions require that enclosure, encapsulation, and repair of asbestos, if undertaken by LEAs, must *prevent* the release of asbestos fibers. 40 C.F.R. 763.83; see 52 Fed. Reg. 41830, 41832, 41836 (1987).

Recognizing that its descriptions of appropriate response actions must be flexible enough to accommodate the variations in the condition and location of asbestos in schools across the nation, the EPA decided to allow LEAs discretion to define their responses within a range of appropriate alternatives. The appropriate response thus would depend on such factors as the location and condition of the asbestos-containing material, the technological feasibility of various response actions, and economic considerations. See 52 Fed. Reg. 15829 (1987); *id.* at 41832. The EPA also described an approach by which the LEA can select the least burdensome option from the range of response actions that are sufficient to protect human health and the environment. 40 C.F.R. 763.90; 52 Fed. Reg. 15829, 41832 (1987). Under that approach, if asbestos is in some degree damaged, some action is generally required. The overriding concept, however, is to return the damaged material to an undamaged state or to prevent damage from occurring, so as to prevent fiber release.

3. Various asbestos manufacturers challenged the AHERA rules on several grounds. They argued, among other things, (1) that the EPA had failed to identify appropriate response actions that were sufficient to protect health and the environment and were the least burdensome and that the EPA had erred in leaving those determina-

tions to the LEAs with the help of accredited contractors; (2) that the EPA had erred in failing to determine what level of exposure to asbestos was "safe"; (3) that the EPA had failed to provide an objective means for distinguishing safe from unsafe schools and should have adopted air monitoring as the objective means for doing so; and (4) that the EPA had improperly permitted LEAs to remove asbestos in schools even though removals increase rather than decrease airborne asbestos levels. The court of appeals rejected all of those arguments (Pet. App. A1-A13).

First, the court held (Pet. App. A7-A9) that the EPA had acted properly under the statute in not specifying a single least burdensome response action in the statutorily specified situations but instead "offer[ing] a list of specific responses that it adjudged sufficient to protect human health, along with a *method* by which school officials should be able to determine the least burdensome response" (*id.* at A8) (emphasis in original). The court noted that Congress had imposed on the EPA the burden of reconciling several competing demands—notably, that the EPA generally describe response actions using the least burdensome methods, and that, in doing so for the more than 30,000 schools covered by the statute, it take account of local conditions (*id.* at A7-A8). Because the EPA could not visit every school, the EPA could reasonably settle on a solution that worked a compromise—providing for inspections of local conditions by accredited inspectors, preparation of detailed reports setting forth options and recommendations, selection of a response action from among those found sufficient by the EPA, and oversight by state Governors. That compromise solution, the court concluded (*id.* at A8), effected a "reasonable, faithful in-

terpretation of AHERA's somewhat contradictory commands."[5]

The court of appeals also found meritless the contention that the EPA erred in acting before determining what quantitative measure of asbestos exposure was safe and in not mandating use of air monitoring to determine when that level is exceeded (Pet. App. A9-A10). The court observed (*ibid.*) that Congress had recognized that experts currently disagree over what levels of exposure are safe, that the EPA had not abandoned its duty but had considered evidence on the question, and that Congress had "stated that EPA's existing guidelines should serve as minimum standards in devising appropriate response actions" (*id.* at A9). The legislative history, the court noted (*ibid.* (citing 132 Cong. Rec. S15064-S15066 (daily ed. Oct. 3, 1986) (joint explanatory statement); *id.* at H8823 (daily ed. Oct. 1, 1986) (remarks of Rep. Florio)), "affirmatively suggests" that the EPA need not rely on air monitoring or establish a quantitative measure of minimum safety. Rather, Congress contemplated growing precision in the EPA's regulations as more information becomes available (Pet. App. A9-A10). The court added (*id.* at A10 (emphasis in original)): "Indeed, the petitioners' insistence that EPA construct a quantitative model before it do anything else offends common sense as well as congressional intent, for the *potential* hazards posed by presently undamaged [asbestos-containing material] obviously could not be quantified or measured by air monitoring techniques." Especially in light of the congressional directive that the EPA err on the side of caution, the

[5] The court also observed (Pet. App. A7): "it is highly ironic that industry representatives assail EPA for supplying inadequate guidance to school officials when their counsel have assured us that those officials are now thoroughly satisfied with the regulatory guidance provided by EPA."

court concluded (*ibid.*), the EPA's decision not to require air monitoring or to designate certain exposure levels as safe was not arbitrary or capricious.

The court of appeals further ruled (Pet. App. A11-A13) that the EPA reasonably rejected the manufacturers' contentions that removal of asbestos should be prohibited or limited. The court observed (*id.* at A11 (emphasis in original)) that the EPA reasonably rejected the manufacturer's evidence that removal caused increased levels of asbestos in the air, because that evidence was "based on a small sample of cases, in at least some of which abatement actions were *not* done properly," and the "EPA's regulations covering removal were intended to prevent this occurrence in the future." The court added (*id.* at A11-A12) that "Congress apparently assumed that removal would always be an option." Finally, the court rejected as "patently mistaken" the argument that removal should be prohibited simply because it is "merely innocuous rather than beneficial" (*id.* at A12). The court noted that the EPA's regulations were entirely neutral with respect to removal and were fully in accord with congressional intent, because the legislative history made clear that the EPA " 'should not discourage a school from going ahead and eliminating [its] long-term asbestos problem if school officials should decide that is the best course of action.' " *Ibid.* (quoting 132 Cong. Rec. S15067 (daily ed. Oct. 3, 1986) (remarks of Sen. Baucus) and citing *id.* at S15066 (remarks of Sen. Stafford)).

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

Petitioner's primary contention (Pet. 17-21) is that the court of appeals failed to hold the EPA to the mandate of AHERA and instead permitted the agency to escape its duty because it had made a "good faith" effort. That contention is wholly without merit. Nowhere in the court of appeals' opinion do the words "good faith" appear, and nowhere in the opinion is there any suggestion that a mere good faith effort to comply with a statutory mandate can validate a regulatory action that is in fact contrary to statutory commands. What the court of appeals concluded was that AHERA contains "somewhat contradictory commands" and that the EPA's AHERA rules are a "reasonable, faithful interpretation" of those commands in light of current scientific knowledge (Pet. App. A8). Accordingly, the court of appeals did not, as petitioner suggests, depart from ordinary principles of judicial review of agency rulemaking.

Petitioner is also incorrect in its more focused challenges (Pet. 17-18, 20-21, 24-28) to the court of appeals' ruling. In fact, the court correctly found the EPA's rules valid.[6] As the court of appeals explained (Pet. App. A8-A9), Congress directed the EPA, within 360 days, to describe appropriate response actions for various situations presenting actual or potential asbestos problems and to do so in a way that ensures that account would be taken of the local conditions at more than 30,000 schools throughout the nation. The statute further recognizes that it is the schools, not the EPA, that are to develop the necessary asbestos management plans. In those circumstances, it was entirely appropriate, as the court of ap-

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[6] Petitioner does not dispute that the regulations must be upheld unless they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" (5 U.S.C. 706(2)(A)). See 15 U.S.C. 2618(c)(1)(B).

peals ruled (*id.* at A9), for the EPA to establish a range of appropriate response actions together with a sound method by which local officials, with oversight and accredited expert guidance, would select the proper actions for particular problems.[7]

Similarly, given the persistent scientific disagreements about what level of exposure to asbestos (if any) is safe and the clear congressional directive to address potential as well as actual exposure, the EPA acted reasonably, as the court of appeals concluded (Pet. App. A8-A10), in choosing to rely on expert visual inspection rather than air monitoring and in declining to declare that certain levels of exposure are safe. In particular, the EPA's action fully complied with the statutory mandate to "consider and assess" (15 U.S.C. 2643(c)(2)) air monitoring; and the EPA reasonably concluded, based on the risk of exposure during peak episodes of fiber release, that visual inspection is preferable to air monitoring, which could give school officials a false sense of security. Certainly, petitioner's suggestion that the EPA should have done nothing until it could resolve the scientific uncertainty and construct a quantitative model "offends common sense as well as congressional intent" (Pet. App. A10).[8]

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[7] Contrary to petitioner's suggestion (Pet. 18), the congressional declaration that the Purple Book provided inadequate guidance is no ground for finding the EPA rules invalid. The EPA rules furnish more guidance than the Purple Book, including a step-by-step procedure for LEAs to select the least burdensome response action. And the level of detail in the guidance furnished by the EPA rules is, as noted, reasonable in light of the commands of AHERA.

[8] Contrary to petitioner's contention (Pet. 20), the court of appeals' decision does not conflict with this Court's decision in *Industrial Union Dep't* v. *American Petroleum Institute*, 448 U.S. 607 (1980). That case did not involve AHERA but 29 U.S.C. 652(8). The Court's construction in that case, without a majority opinion, of a different

Petitioner contends (Pet. 21-24) that this Court should grant the petition because the ruling below is in an "area of great national importance with far-reaching fiscal and environmental consequences" (*id.* at 21). But the alleged consequences of petitioner's challenge are not sufficient to render further review of the court of appeals' decision appropriate, there being no intercircuit conflict and no substantial legal question presented. Moreover, although the problem of asbestos in school buildings is important, petitioner overstates the impact of its particular challenges.

Petitioner does not challenge the requirements that schools conduct inspections and develop operations and management plans for asbestos that they find. It is those requirements that produce most of the costs associated with the AHERA rules. Similarly, it is at best speculative to suggest that petitioner's challenge would have a significant effect on the costs associated with the many lawsuits that various building owners have brought against asbestos manufacturers seeking reimbursement for abatement. And, of course, the rules do not apply at all to non-school buildings. Hence, even if petitioner were correct in its challenges and the alleged deficiencies in the AHERA rules were eliminated, allowing the court of appeals' decision to stand would not have the far-reaching consequences that petitioner states.

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statute with different language and different legislative history is of little relevance to the proper construction of AHERA in this case.

There is also no merit in petitioner's suggestion (Pet. 20) that the EPA's authorization for schools to delegate their duties to expert contractors (40 C.F.R. 763.80(a)) creates a constitutional delegation problem. The regulation cited by petitioner itself makes clear that schools retain ultimate responsibility for asbestos response actions. In any event, insofar as delegation principles are relevant, AHERA itself clearly provides sufficient standards to guide agency action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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